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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1318~~ 139

DELAWARE SPORTS SERVICE, a Delaware partnership comprised of Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY
and
THE STATE OF DELAWARE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

DELAWARE SPORTS SERVICE, a Delaware partnership comprised of Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman,
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THE DIAMOND STATE TELEPHONE COMPANY
and
THE STATE OF DELAWARE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable The Chief Justice and the Associate Justices of The Supreme Court of the United States:

Delaware Sports Service, a Delaware partnership comprised of Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, filed on February 16, 1966, affirming the

Order of the United States District Court for the District of Delaware dated May 13, 1965, denying Petitioner's motion for an injunction and dismissing Petitioner's Complaint praying that defendant The Diamond State Telephone Company be restrained from discontinuing, disconnecting or otherwise terminating telephone facilities, and Petitioner's use thereof.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, filed February 16, 1966, is reported at 355 F.2d 929 (1966), and is reprinted in the Appendix to this Petition.[2]

The opinion of the United States District Court for the District of Delaware, dated April 27, 1965, is reported at 241 F.Supp. 847 (1965), and is reprinted in the Appendix to this Petition.[3]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[4]

QUESTIONS PRESENTED

1. Does Title 18, Section 1084(d), pre-empt State regulation of interstate telephone communications to prevent communication of gambling information in violation of State law?

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[1] Citations to material included as part of the Appendix to this Petition will be as follows: "App. —".

[2] App. 1a.

[3] App. 2a-13a.

[4] On February 16, 1966, the United States Court of Appeals for the Third Circuit entered the judgment the subject of this Petition. (App. 1a).

2. Is the decision of a State court in a civil case *res judicata* as to questions arising under a Federal statute enacted during the pendency of the State proceeding?

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause, Section 8, Article I of the Constitution of the United States, provides:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Supremacy Clause, Article VI of the Constitution of the United States, provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATUTE INVOLVED

Section 1084(d) of Title 18, United States Code, provides, in pertinent part:

> "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the sub-

scriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

STATEMENT OF THE CASE

Petitioner is a partnership of four individuals, namely:[5] Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman.[6] Petitioner is engaged in the receipt by long line telephones, operating interstate, of the name and number of the first horse to finish in certain races at certain tracks.[7] It also receives similar information over commercial radio and television stations, all of which are subject to the control of the Federal Communications Commission.[8] The information received is passed on by Petitioner over the wires of common carriers subject to the jurisdiction of the Federal Communications Commission.[9] Those carriers are Respondent telephone company and

[5] The transcript of record in this case consists of the appendix record on appeal filed in the Court of Appeals below, pursuant to Rule 75(1), Federal Rules of Civil Procedure, and the Proceedings in said Court. Citations to material included as part of said appendix record on appeal will appear as "App. R. —".

[6] App. R. 3a.

[7] App. R. 3a, 93a.

[8] App. R. 3a.

[9] App. R. 4a, 53a, 71a-72a, 73a.

the Bell Telephone Company. The annual volume of Petitioner's business exceeds $10,000.00.[10]

By letter dated October 13, 1959[11] the Delaware Attorney General sent a letter to Respondent telephone company requesting that the company discontinue telephone service to the Petitioner, asserting that he had reasonable grounds to believe Petitioner was engaged in the business of, and receiving compensation for, the dissemination of information in furtherance of gambling and for gambling purposes. Pursuant to and as a result of the Attorney General's letter, Respondent telephone company notified Petitioner, by letter of November 28, 1960,[12] that it would discontinue service, unless Petitioner obtained a ruling by the Delaware Public Service Commission directing the telephone company to provide such service. On December 14, 1960,[13] Petitioner filed a petition with the Public Service Commission praying that the Commission conduct a hearing to determine whether Respondent telephone company had rightful cause to discontinue telephone service to Petitioner. On June 28, 1961,[14] the Commission granted the Delaware Attorney General's motion for leave to intervene in the proceeding, and thereafter, the Attorney General was the dominant opposing party.

Public hearings were conducted in the matter March 12-15, 1962, and on October 10, 1962, and the Delaware Public Service Commission entered its Order[15] per-

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[10] App. R. 4a.

[11] App. R. 36a, 32a-33a.

[12] App. R. 40a, 33a.

[13] App. R. 33a.

[14] App. R. 95a.

[15] App. R. 33a.

mitting Respondent telephone company to discontinue service (but not directing it to) on the grounds that the telephone company had a reasonable basis for believing that Petitioner was using its telephone service to promote illegal activity. There was no determination that Petitioner had committed any crime. This decision was appealed to the Supreme Court of the State of Delaware, affirmed,[16] and a petition for a writ of certiorari to that court was denied by this Court.[17] The issues raised by the appeal were those of due process and freedom of speech.

In September, 1961, the Congress of the United States enacted 18 U.S.C. § 1084(d), which reads as follows:

> "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by *it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law,* it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise pro-

[16] App. R. 33a; *In re Delaware Sports Service,* —— Del. ——, 202 A. 2d 568 (1963).

[17] *In re Delaware Sports Service,* Dkt. No. 603, October Term, 1964; 379 U.S. 965 (1965).

vided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored." [Emphasis supplied]

By letters of August 7 and August 14, 1964,[18] the Attorney General of the State of Delaware again requested Respondent telephone company to discontinue service to Petitioner.

Thereupon, Petitioner filed its sworn Complaint in the United States District Court for the District of Delaware, seeking injunctive relief pursuant to 18 U.S.C. § 1084(d); i.e., service could not be discontinued until there was a determination of a violation of law and that otherwise to permit discontinuance of service constituted deprivation of property without due process of law.[19]

REASONS FOR GRANTING THE WRIT

The Public Interest Requires That This Court Determine Whether or Not Title 18, Section 1084, of the United States Code Pre-Empts State Regulation of Interstate Telephone Communications To Prevent Communication of Gambling Information in Violation of State Law.

It is proposed that this Court consider whether enactment of Title 18, Section 1084, of the United States Code, pre-empted the States from interfering with interstate telephone communication service to prevent communication of gambling information, as determined

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[18] App. R. 41a, 48a; 33a-34a.

[19] App. R. 7a-8a; Jurisdiction in the United States District Court for the District of Delaware was based on Petitioner's claim of a Federal right arising under 18 U.S.C. § 1084(d) to operate its business, with an annual volume exceeding the sum of $10,000, free from the complained of interference by the State of Delaware, and therefore fell within the jurisdiction of 28 U.S.C. § 1331(a).

by Congress by virtue of its constitutional power over interstate commerce.

By Article I, Section 8, Clause 3, of the Constitution of the United States the several States of the United States conferred upon Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Telephone messages passing from one state to another have long been held to be interstate commerce. *Oklahoma-Arkansas Tel. Co.* v. *Southwestern Bell Tel. Co.,* 45 F.2d 995, 1000 (8th Cir., 1930), cert. den. 283 U.S. 822-823 (1931). While decisions of this Court indicate that the exercise of State police power is not wholly preempted from subjects incidentally affecting interstate commerce, *Simpson* v. *Shepard,* 230 U.S. 352, 402 (1913); *Western Union Telegraph Co.* v. *James,* 162 U.S. 650, 656 (1896), it remains firmly established that to the extent Congress has acted pursuant to its power over interstate commerce, State action with regard to that subject is foreclosed under the Supremacy Clause.[20]

The States may, under certain circumstances, have concurrent jurisdiction over subjects, such as telephone communication, within their borders but which are part of commerce between the States. Where Congress, however, passes a law such as 18 U.S.C. § 1084(d) governing a subject previously subject to concurrent State jurisdiction, any prior State law which is inconsistent with such federal enactment is void. *Sperry* v. *Florida,* 373 U.S. 379, 384 (1963).

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[20] Article VI of the Constitution of the United States.

In this case, the common law procedure,[21] if such ever validly existed, employed by the State of Delaware to bring about a termination of Petitioner's interstate telephone service was clearly superceded by Section 1084(d).[22] This common law procedure has long been considered dubious at best. First of all, it has been pointed out that deprivation of telephone service must be based on actual violation of the law, and not mere suspicion. *Andrews* v. *Chesapeake & Potomac Tel. Co.*, 83 F.Supp. 966, 968-969 (D.C.D.C., 1949), 89 F. Supp. 176 (D.C.D.C., 1949); *H & R Pub. Co.* v. *Illinois Bell*, 26 Ill. Commerce Commission 155 (1946). In *Andrews, supra,* Judge Alexander Holtzoff pointed out:[23]

> "* * * A public utility may not deprive a member of the public of his rights to service merely because it receives a notice from a law enforcement agency that he is using the service for illegal purposes. A public utility may refuse, and, in fact, must refuse, service if to its knowledge the service is being used for illegal purposes. *This fact must, however, be established.* To confer what would amount to judicial power on a law enforcement officer and to exercise such power ex parte would be violative of due process of law and would deprive members of the public of their legal rights.

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[21] App. R. 75a, 83a, 100a-101a.

[22] Although the District Court asserted that this was a case of the utility's voluntary discontinuance of service (App. 8a), the underlying reality is that no threat to Petitioner's telephone service occurred except upon the initiative and active intervention of the Delaware Attorney General. It is the State of Delaware which has in reality commenced and prosecuted the proceedings to terminate Petitioner's telephone service.

[23] *Andrews, supra,* at 83 F. Supp. 968-969.

> A public utility may not do this, and neither may a regulatory administrative body." [Emphasis supplied]

Thus the common law procedure utilized by Delaware exceeded its constitutional power.

Secondly, it has been observed that aside from the due process questions involved, States are without jurisdiction so to interfere with the telephone service of a member of the public, at least insofar as interstate transmission is concerned. *Telephone News System, Inc.* v. *Illinois Bell Tel. Co.*, 220 F.Supp. 621, 627 (D.C.N.D. Ill., E.D., 1963), aff'd *per cur.* 376 U.S. 782 (1964). The diversity of problems involved in leaving regulation of interstate telephone transmissions to the actions of individual States, where some prohibit off-track betting, and some do not; and many foreign countries do not; and where such transmissions are necessarily made every day by wire services to newspapers and radio broadcasters for legitimate dissemination, indicate the need for exclusive federal regulation of the subject.

It was to settle and resolve these questions, accordingly, that Congress enacted Title 18, Section 1084(d). As stated in House Report No. 967 on this new statute:[24]

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[24] U.S. Code Congressional and Administrative News, 87th Congress, 1st Session, 1961, p. 2631. The more complete legislative history as set out in pertinent part in U.S. Code Congressional and Administrative News, 87th Congress, 1st Session, 1961, pp. 2631-34 is reflected in House Report No. 967:

> "The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities

"The purpose of the bill is * * * to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of * * * gambling information *in interstate and foreign commerce.*" [Emphasis supplied]

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by prohibiting the use of wire communication facilities which *are* or *will be* used for the transmission of bets or wagers and gambling information in interstate and foreign commerce. [Emphasis supplied]

• • •

"The bill does not include within its provisions radio and television stations. The Attorney General is of the opinion, and the Federal Communications Commission agrees, that the Commission has adequate authority under existing law to prevent the transmission of gambling information over the radio and television facilities • • • • "

Attorney General Robert F. Kennedy's letter discussing the proposed legislation stated:

"The purpose of this legislation is to assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of or the leasing, furnishing, or maintaining of wire communication facilities which *are* or *will be* used for the transmission of certain gambling information in interstate and foreign commerce. Radio and television stations have not been included since we believe that the Federal Communications Commission has ample authority to control transmission of gambling information by such facilities.

• • •

"The enclosed proposal would prohibit the leasing, furnishing, or maintaining of wire communication facilities, as defined therein, *with intent that they be used* for the transmission of bets or wagers or information assisting in the placing of bets or wagers, and *would prohibit the use* of such facilities for the transmission of gambling information • • • " [Emphasis supplied]

Obviously, the intent of Congress was to provide a uniform procedure for the termination of interstate wire communication of betting information, applicable in all States, which would be beyond constitutional question as to due process. By its very terms, Section 1084(d) applies to *any interstate* wire communication of gambling information, and therefore all prior State law on the subject, insofar as it is inconsistent with the Federal statute,[25] is superceded.

District Judge Caleb R. Layton concluded, however, that Section 1084(d) had no application whatsoever to Petitioner's case and that it would be treated as a common law type proceeding arising under established Delaware case law rules.[26] Judge Layton stated, therefore, that Respondent telephone company could terminate telephone service furnished Petitioner if the telephone company could prove that it *reasonably believed* the service was being used to aid an illegal purpose, applying the Delaware common law rule.[27] Petitioner has contended nevertheless that Congress, in enacting 18 U.S.C. §1084(d) and therefore pre-empting the unlimited exercise of the power of the State of Delaware over telephone service furnished Petitioner, also established that such telephone service cannot be interrupted absent a prior *prima facie* factual showing that it is being used or will be used for illegal purposes, under a new and controlling Federal Rule.

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[25] App. R. 68a.

[26] App. 8a-10a; App. R. 74a-75a, 83a.

[27] App. 11a. Judge Layton characterized this quantum of proof as *"valid suspicion"*, App. R. 74a, of conduct which *"tended"* to promote illegal activity. App. R. 82a.

To resolve the conflict between these two positions this Court need only note that Section 1084(d) predicates resort to its sanctions on there being a prior factual determination that telephone service "*is being* used or *will be* used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce" and nowhere establishes "reasonable grounds" as a predicate to governmental action. When Respondent telephone company in its November 28, 1960 letter[28] purported to terminate Petitioner's telephone service because it had "reasonable grounds to believe" that such service was being used for illegal purposes, therefore, the company really made a common law proffer of action based on information and belief, absent any *prima facie* factual showing that Federal, State, or local law was being, or would be, violated, which is the governing Federal test.

The summary affirmance of Judge Layton's decision by the United States Court of Appeals for the Third Circuit directly conflicts with the above-quoted express provision of Section 1084(d), but Petitioner moreover submits that the Third Circuit's decision is also inconsistent with the decision of the United States Court of Appeals for the Seventh Circuit in *Kelly* v. *Illinois Bell Telephone Company*, 210 F.Supp. 456, 470 (D.C.N.D. Ill., E.D.,1962), aff'd 325 F.2d 148, 151-152 (7th Cir., 1963), also recognized in *Telephone News System, Inc.* v. *Illinois Bell Tel. Co.*, 210 F.Supp. 471, 475-476 (D.C.N.D.Ill., E.D.,1962), 220 F.Supp. 621, 632 (D.C. N.D.Ill., E.D.,1963), aff'd *per cur.*, 376 U.S. 782 (1964).

In *Kelly, supra,* a proposed termination of interstate telephone and telegraph service was prompted by

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[28] App. R. 40a.

United States Department of Justice letters written in 1962 to the Illinois Bell Telephone Company and the Western Union Company informing them that Department of Justice information revealed that a certain Western Union Sports Ticker furnishing service to Illinois Sports News "is being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law * * * *"[29]

Businessmen plaintiffs using such Ticker brought a suit for a Federal injunction against the discontinuance of such service on the basis that they were not violating Federal, State, or local law and therefore were not within the sanctions of 18 U.S.C. § 1084(d). In the trial proceedings the Department of Justice acknowledged that as an element of its case it had to prove that such telephone and telegraph service was being used illegally to transmit gambling information, and sought to prove this fact through a July 20, 1962 Federal jury verdict against the same plaintiffs. That verdict found them guilty on four counts, and not guilty on eight counts, of a twelve count indictment charging them with sending paraphernalia (consisting of skids of paper and printed copy for their Kentucky publication "Louisville Daily Sports News") used or to be used illegally in gambling. The plaintiffs had stipulated previously in the civil case that they used the telephone and telegraph to transmit information interstate for use in the "Louisville Daily Sports News", and the government reasoned inferentially that if providing tangible materials for inclusion in that publication was illegal then the publication itself was illegal,

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[29] *Kelly, supra,* at 210 F.Supp. 461.

and in turn wire service used to send additional copy for the publication was in aid of an illegal purpose within the proscription of Section 1084(d).

District Judge Hubert L. Will, however, decided that since the July 20, 1962 Federal jury verdict was decided against the plaintiffs on only four of the twelve counts of the indictment involved, the inferences which could be drawn from the *fact* of the verdict were equivocal insofar as they might prove the jury had found as a fact that the telephone and telegraph facilities in question *were used* to transmit gambling information eventually published in the "Louisville Daily Sports News." Judge Will said:[30]

> "In short, the simple fact of the matter is that no conclusion can be drawn with any assurance on the basis of the Indictment and Judge Brooks' Trial Order on *the sole question before this Court*, i.e., whether telephone or telegraph facilities *were used* by plaintiffs for the purpose, in the language of Section 1084(d), 'of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law.'" [Emphasis supplied]

Petitioner points out that because Judge Will turned to the July 20, 1962 jury verdict as a possible source for the *factual determination* on "the sole question" before him shows that he construed the prior requirement for interruption of interstate telephone service, and the application of Section 1084(d), to be that a prior *prima facie* factual showing must be made that such interstate service is being, or will be used, to transmit gambling information in violation of law before

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[30] *Kelly, supra*, at 210 F.Supp. 470.

the sanctions of Section 1084(d) may be imposed on a party such as Petitioner. In affirming Judge Will, the Seventh Circuit also recognized that his search for this prior *prima facie* factual showing was a necessary predicate to the application of Section 1084(d) in the case:[31]

> "To ascertain whether the record before him established by a preponderance of the evidence (this being a civil action) that plaintiffs were using the facilities in question to transmit or receive gambling information in interstate or federal commerce in violation of law so that § 1084(d) became applicable to plaintiffs, the District Judge examined each of the statutes which the government contended *had been violated* * * *" [Emphasis supplied]

The Seventh Circuit then, after concluding that telephone and telegraph service could not be denied to the publishers of "Louisville Daily Sports News", went on to delineate the future factual showing upon which Section 1084(d) sanctions could be imposed upon them:[32]

> "As plaintiffs point out, however, discontinuance of their facilities is not prohibited to defendants if additional *prima facie evidence should be adduced* in the future reflecting *use* of defendants' facilities, in some manner other than that set forth in the Stipulation, the Findings of Fact and the Opinion, which *does show* a violation of Federal, State, or local law." [Emphasis supplied]

Petitioner emphasizes that the Seventh Circuit did not decide that the sanctions of Section 1084(d) would

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[31] *Kelly, supra*, at 325 F. 2d 151-152.

[32] *Kelly, supra*, at 325 F. 2d 152-153.

be applicable if there were "*reasonable grounds to believe*" that the use of the communication facilities in question violated Federal, State, or local law, but rather required that future evidence to be adduced *did show* such violation. This decision is inconsistent with the affirmance by the Third Circuit of District Judge Layton's contrary conclusion discussed above,[33] and this Court should resolve these incompatible views of the necessary evidentiary showing within the pre-emptive jurisdiction of Section 1084(d).[34]

The effects of the decisions of the Seventh and Third Circuits, indicating what are different degrees of initial factual showing in order to invoke sanctions within the jurisdiction of Section 1084(d), because they are different, are bound to cause confusion through differing results in identical cases according as they arise under Federal or State Law. Petitioner points out particularly that the Third Circuit's decision in this case, in effect approving the common law rule applied by Judge Layton, will have a relatively greater impeding effect on telephone and other wire communication service in interstate commerce since States following it, such as Delaware, will be able to exercise too

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[33] App. 11a.

[34] Petitioner recognizes Judge Layton's conclusion in this regard as being *obiter dictum* compared to the decision of the Seventh Circuit in *Kelly, supra,* and therefore the Third Circuit's decision in this case is not technically in conflict with that of the Seventh Circuit. The fact still remains that the *effects* and the substance of the decisions of these two Circuits are inconsistent and raise a question which should be settled by this Court now. If it is not, Federal courts may still feel free hereafter to follow District Judge Layton's rule of decision in this case in other cases initially arising under State law but which are within the jurisdiction of Section 1084(d). App. R. 71a.

liberal a police power based on "reasonable grounds" of belief that such service will be used illegally. Application of the Seventh Circuit's rule in *Kelly, supra,* on the other hand will be based on a relatively stiff requirement of hard *prima facie* proof that service "*is being* used or *will be* used" illegally. This seems a more difficult evidential test for governmental officials to meet with substantial evidence gathered in investigation, and consequently, they are less likely to have a basis upon which to seek termination of interstate telephone or other interstate wire communication service in question. The result of application of this test can be expected to be that interstate commerce will be relatively less likely to be impeded.

Accordingly, this Court should decide the degree to which interstate telephone and other wire communication shall be impeded by the operation of Section 1084(d), whether by strict Seventh Circuit Federal test or liberal Third Circuit common law test, for the two tests are inconsistent in application to interstate commerce. Petitioner for its own part concludes that the express terms of Section 1084(d), and the legislative history thereunder, preclude the formulation of any other rule except one requiring the strict Seventh Circuit *prima facie* evidential showing that an interstate telephone service facility such as that used by Petitioner *is being* used, or *will be* used, illegally to transmit gambling information.[35]

Petitioner also notes that District Judge Hubert L. Will, who reluctantly concurred with the views of

[35] Petitioner submits that this strict rule is consistent with this Court's affirmance in *Telephone News System, Inc., supra,* where Judge Hubert L. Will stated that any action under Section 1084(d) is necessarily predicated on a violation of law by the utility user. 220 F.Supp. 640.

Chief Circuit Judge John S. Hastings and District Judge Julius J. Hoffman in *Telephone News System, Inc., supra,* expressed great concern over the procedural ease with which even the strict Seventh Circuit test under Section 1084(d) can be applied:[36]

> "What concerns me is that, while any action under Title 18 U.S.C. § 1084(d) is *necessarily predicated on a violation of* federal, state or local *criminal law* by the utility user, the proceedings permitted under the statute, because allegedly civil in nature, are far short of what would constitute due process and the sanctions, on the other hand, far more serious than were criminal action taken directly under the same federal, state or local laws against the same utility user. [Emphasis supplied]
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> "Although we are here called upon to pass only on the application of sec. 1084(d) to the facts of the instant case, it is appropriate, at least in passing, to reflect upon the implications and possible application of the procedure to other situations, for it represents, I believe, a new technique in criminal law enforcement. If the withdrawal of a vital utility service may be accomplished constitutionally by the simply mechanics contemplated by sec. 1084(d) where the facility is allegedly being used to violate federal, state or local criminal laws relating to gambling, it presumably will be equally valid for eliminating alleged violations of other federal, state and local criminal laws, such as federal and state anti-trust laws, those regulating the sale and distribution of securities, the possession and sale of narcotics, income, sales and other tax laws and so on."

Particularly in view of the concern expressed by Judge Will about the potential application of Section

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[36] *Telephone News System, Inc., supra,* at 220 F.Supp. 640, 643.

1084(d), Petitioner submits that this Court should address itself herein to the question of the extent to which telephone and other wire communication in interstate commerce shall be impeded by the types of Federal and State proceedings which took place below.

An Important Question of Whether the Decision of a State Court in a Civil Case Is Res Judicata as to Questions Arising Under a Federal Statute Enacted During the Pendency of the State Proceeding Has Not Been, But Should Be, Decided by a Determination of This Court

District Judge Layton determined below that the questions presented in this case were *res judicata,*[37] but this finding is not supported by the actual circumstances herein.

The issues drawn in the pleadings, and upon which the hearings before the Public Service Commission were held, were based on the law existing at that time. Therefore, the decisions of that Commission and of the affirming Delaware Courts were based on the issues arising under such law, and not those arising under the law applicable subsequent thereto, within the purview of 18 U.S.C. § 1084(d). As the Supreme Court of California said *in banc,* in *Yager* v. *Yager,* 7 Cal.2d 213, 217-218, 60 P.2d 422, 425 (1936):

> "* * * It is a general rule that a party cannot put in issue rights acquired *pendente lite* unless a supplemental pleading is filed, and if such a pleading is not filed he is not foreclosed from asserting such rights in a subsequent action. (*Brown* v. *Brown,* 170 Cal. 1, 147 P. 1168; *Metropolis, etc., Sav. Bank* v. *Barnet,* 165 Cal. 449, 132 P. 833; *People* v. *Holladay,* 68 Cal. 439, 9 P. 655; *People's Sav. Bank*

[37] App. 5a.

v. *Hodgdon,* 64 Cal. 95, 27 P. 938; 2 Freeman on Judgments, 5th ed., p. 1510; 15 Cal. Jur. 165.)"

In this case, no supplemental pleading was filed in any State proceeding to draw in issue the application of the provisions of Section 1084(d) to Petitioner and therefore the rule recognized in *Yager; supra,* permits this Court's consideration of the questions now presented.

The just basis for such a rule is readily ascertainable. To bind parties to what might have been litigated is perfectly sound, but only up to the time the final pleadings define the issues. Once the issues have been cast, it is not equitable to demand that a party be responsible for knowing of, and acting on, changes in statutory law affecting the litigation, indefinitely, until an opinion is handed down. If the rule were otherwise a litigant would be increasingly unable properly to protect his rights arising under statutes becoming effective later in the course of proceedings—particularly on the day judgment were to be entered. This Court should for the first time adopt a Federal civil rule precluding such anomaly.

Moreover, the general rule in criminal cases has been that the decision of a State court on a Federal question is not *res judicata* in a Federal forum unless the State forum was deliberately selected by the complaining party and also the State court decided the Federal question. Even so, this Court noted in *Stein* v. *New York*, 346 U.S. 156, 181 (1953) that while a Federal court will give some weight to the decision of a State court on a Federal question, it is not bound to do so:

"* * * this Court cannot allow itself to be completely bound by state court determination of any

> issue essential to decision of a claim of federal right, else federal law could be frustrated by *distorted fact finding.*" [Emphasis supplied]

This general rule was applied in *Vassar* v. *Raines,* 274 F.2d 369, 371 (10th Cir., 1959), cert. den. 360 U.S. 936 (1959), 362 U.S. 982 (1960), where the appellant had raised the question of his Oklahoma State conviction as an habitual criminal as being violative of Fourteenth Amendment due process and had the matter decided adversely to him by the highest court of that State. Notwithstanding this, appellant was permitted to relitigate this precise question of due process in a Federal Court and, although the question was again decided adversely to him, the Tenth Circuit noted:[38]

> "* * * Since the question presents a question of due process under the Federal Constitution, Amend. 14, the decision of the State Court, while entitled to great weight, is not binding on us in this proceeding."

A different rule has arisen in civil cases in which the litigant has deliberately selected a State court as his forum, to the effect that he may be barred by *res judicata* even as to a federal question. See *Grubb* v. *Public Utilities Commission,* 281 U.S. 470 (1930). Nevertheless, two clear cut exceptions exist to the *Grubb* doctrine: First, the State court must have made a finding as to the Federal question; and Second, the litigant must have willingly selected the State tribunal as his forum.

This Court in *Grubb, supra,* pointed out the first exception by observing from the decision of the Ohio

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[38] *Vassar, supra,* at 274 F. 2d 371.

Supreme Court that it recognized and decided the Federal question involved:[39]

> "* * * while the opinion makes no specific reference to the attack on the constitutional validity of the order, it leaves no doubt that the court regarded that and other objections to the order as untenable, and on that basis affirmed it * * *"

The second exception has been recognized by this Court to apply where the litigant does not "freely and without reservation" submit his question to the State court. *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 419 (1964).

The background of this case clearly shows, however, that both exceptions apply and *res judicata* is inapplicable here. First, the *per curiam* decision of the Supreme Court of Delaware[40] and the decision of the Superior Court of Delaware for New Castle County,[41] disclose no finding or adjudication as to the relevant Federal question and fall short of the finding accepted as adequate by this Court in *Grubb, supra*.

Of more importance is the circumstance that Petitioner was never in substance a deliberate and willing litigant in the State forum and that District Judge Layton's contrary conclusion that Petitioner was is a a distorted finding of fact.[42] How unwilling Petitioner was is reflected in the case background discussed in the Superior Court's opinion:[43]

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[39] *Grubb, supra*, at 281 U.S. 478.

[40] *In re Delaware Sports Service, supra*, 202 A. 2d 568.

[41] *In re Delaware Sports Service*, — Del. —, 196 A. 2d 215 (1963).

[42] App. 5a.

[43] *In re Delaware Sports Service, supra*, at 196 A. 2d 217-218; App. R. 68a.

"For many years the Attorney General's office had attempted to terminate the business of the Delaware Sports Service. After an unsuccessful attempt to terminate this business through the courts in 1949 * * * the Legislature, on the recommendation of the then Attorney General, enacted certain statutes which the Attorney General hoped to use to eliminate businesses of this nature.

* * *

"* * * Thereafter, the Attorney General again requested the Telephone Company to discontinue telephone service to Sports Service. Whereupon, Diamond State notified Sports Service *that it would terminate its telephone service unless Sports Service filed a petition with the Public Service Commission by a certain date.* Sports Service filed a petition with the Public Service Commission seeking to prohibit the telephone company from terminating its services. * * * *" [Emphasis supplied]

In the vernacular, Petitioner was forced into the State forum at gunpoint. Having not freely chosen the State forum, Petitioner should not be bound by the doctrine of *res judicata.*

This Court should look to the substance of this circumstance and establish that in State civil cases giving rise to a Federal question, this Court's rule in *Grubb, supra,* will be inapplicable to bar subsequent Federal court adjudication of the question when the complaining litigant is forced to accept a State forum under the type of administrative process used against Petitioner.

This question merits this Court's immediate determination for in its absence many important Federal questions of the type affecting Petitioner will never be able to reach the Federal court system once the cases involving them arise initially in the States. Such a

result would merely be a reflection of State administrative process sleight-of-hand, as evidenced in this case in Delaware, and not be expressive of this Court's rule of decision in *Grubb, supra,* that Federal court review of Federal questions be preserved unless the one raising them freely seeks and receives a State court determination of them. The Court should act here in the interest of these Federal questions.

CONCLUSION

This Court should decide what accommodation there shall be between the operation of Section 1084(d) and the exercise of State power over telephone service in interstate commerce, for they already are in conflict evidenced by this case.[44]

It is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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[44] *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 241-242 (1959).